A

PP

v.

SAININ SIDON

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: K41-43-2007]
13 MARCH 2009

C ***CRIMINAL PROCEDURE:*** *Sentence - Binding over - Outrage of modesty - Whether order of binding over inappropriate and not fitting to circumstances of crime - Criminal Procedure Code, s. 294 - Penal Code, s. 354*

D ***CRIMINAL LAW:*** *Penal Code - Section 354 - Outrage of modesty - Order of binding over - Whether inappropriate and not fitting to circumstances of crime - Criminal Procedure Code, s. 294*

The respondent pleaded guilty to a charge of using criminal force to outrage the modesty of a young woman under s. 354 of the
E Penal Code. In his plea in mitigation, he asked to be sentenced to a fine only. He also said that he had three children, had no fixed job and was supporting his parents-in-law. Further, his wife had just given birth and was still at the hospital. The learned magistrate convicted the accused and ordered him to be bound
F over for good behaviour for a period of one year pursuant to s. 294 of the Criminal Procedure Code ('CPC'). The Public Prosecutor now appealed against the decision of the learned magistrate.

G **Held (allowing the Public Prosecutor's appeal):**

(1) An order under s. 294 CPC is not a sentence. It is only an order to behave and the offender is not punished for the crime that he has committed. The court must not resort to this
H provision where the facts and circumstances do not justify such order. Where the law provides for a punishment the offender must be punished in accordance with that law. The discretion under s. 294 CPC must be exercised judiciously and not arbitrarily. Each individual case must be considered on its
I merits and must be examined with a view to ascertaining whether having regard to any of the matters in s. 294 CPC binding over is in all the circumstances of the case expedient. (para 9)

(2) The reference to character in s. 294 CPC must mean the good character of the offender including his clean record prior to his conviction. Significantly, the shoulder note to that section reads "First offenders". In the present case, the respondent was not a first offender. He had a previous conviction for a similar offence for which he had been sentenced to six months' imprisonment and two strokes of the rotan. Obviously he had not learnt his lesson. A person who had a previous conviction and repeated the same offence was not entitled to leniency unless there were compelling reasons to do so. It was not in public interest to be lenient with repeat offenders. (para 12)

(3) The respondent was 34 years old at the time of the offence and 36 years old at the time of his conviction. He was neither too young nor too old to qualify for an order under s. 294 CPC. As for his health and mental condition there was nothing before the court to warrant the exercise of the discretion in his favour. There was also no extenuating circumstances under which the offence was committed. The offence was punishable with imprisonment for a term which might extend to ten years with the option of fine or whipping or with any two such punishments. The offence was not a trivial offence. It was prevalent and the court must take judicial notice of that fact. The complainant's evidence showed that violence was used and that the respondent threatened to kill her if she resisted. (paras 13 & 14)

(4) The offence was not committed in a moment of weakness and on the spur of the moment. It was a deliberate and calculated act on the part of the respondent. There could be no doubt that his intention was to rape the complainant. He might have succeeded if the complainant had not put up a fight. The photos of the scene of the crime showed that the drain into which the complainant was pushed into was quite deep and had concrete walls on both sides. The complainant could have been seriously injured if she had knocked herself against the wall after being pushed by the respondent. There was complete disregard for her safety. (para 15)

(5) The prerequisites for the exercise of discretion under s. 294 CPC was not present in the present case. What the respondent said in his plea in mitigation was totally irrelevant for that purpose. He was merely pleading hardship from the consequences of his own act. (para 16)

(6) The courts as guardians of public interest must deal properly with evildoers. Otherwise the public would be led into thinking that the courts were placing the interest of criminals above the interest of the public. In appropriate cases it was not wrong for the court to temper justice with mercy but it must not be at the expense of the public. The order of binding over in the present case was wholly inappropriate and not fitting to the circumstances of the crime. The respondent's act called for a deterrent punishment. For that reason, the order of the learned magistrate was set aside and substituted with a sentence of four years' imprisonment and three strokes of the rotan. (para 17)

Case(s) referred to:
PP v. Chew Jim [1950] 1 LNS 48
PP v. Jafa Daud [1981] 1 LNS 28
PP v. Idris [1955] 1 LNS 93 HC
PP v. Lim Hong Chin [1994] 1 CLJ 79 HC
PP v. Yeong Yin Choy [1976] 1 LNS 119 HC

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 294

Criminal Procedure Code [Ind], s. 360

Other source(s) referred to:
Sohoni's Code of Criminal Procedure, 19th edn, p 3893

For the prosecution - Eyu Ghim Siang DPP; AG's Chambers Sabah
Respondent In Person

Reported by Usha Thiagarajah

JUDGMENT

Abdul Rahman Sebli JC:

[1] The respondent was charged in the Magistrates Court with using criminal force to outrage the modesty of Raineh binti Hadimin, a 23 year old woman. The charge is as follows:

Bahawa kamu, pada 16.09.2006 lebih kurang jam 0700 malam bertempat di tepi jalan raya Kg. Sinisian Kundasang dalam Daerah Ranau, dalam Negeri Sabah, telah didapati menggunakan kekerasan jenayah bagi maksud mencabul kehormatan penama Raineh binti Hadimin perempuan 23 tahun, oleh itu kamu telah melakukan satu kesalahan dibawah seksyen 354 Kanun Keseksaan dan boleh dihukum dibawah seksyen yang sama.

[2] He claimed trial to the charge but after the prosecution had called six witnesses to testify including the complainant he changed his plea to a plea of guilty. In his plea in mitigation he asked that he be sentenced to a fine only. He said he had three children, had no fixed job and was also supporting his parents in law. He also told the court that his wife had just given birth and was still at the hospital. After entering a conviction against the respondent the learned magistrate ordered the respondent to behave himself for a period of one year pursuant to s. 294 of the Criminal Procedure Code ("the Code") and to deposit a sum of RM3,000 (only RM1,500 deposited) in one surety. The Public Prosecutor is dissatisfied with the order, hence this appeal.

[3] The testimony of the complainant is that on 16 September 2006 at about 7pm she was on her way home on foot alone after finishing work at the Sri Pinang restaurant where she worked as a waitress. The distance between the restaurant and her home is about 1 kilometer. She was wearing a jubah, black tudung and white jacket, nothing seductive. As she reached the workshop at her kampong she was pushed into a big drain by the respondent. At that time there was a blackout and the surrounding area was very dark. It is obvious that the respondent had been stalking her and waiting for the right moment to strike. After pushing her into the drain the respondent punched her in the face repeatedly and warned her not to resist or else he would kill her. He strangled her neck and told her that he only wanted her. The respondent then pulled her underwear up to her knee.

[4] However the respondent got more than what he bargained for when the complainant fought back. She kicked the respondent, aiming at his private part but could not reach it. She shouted for help but her voice could hardly come out as the respondent was choking her. She continued to struggle to break free of the respondent. Sensing that the tables would be turned against him the respondent let go of the complainant and fled the scene on foot. The complainant was sure it was the respondent who attacked her that night judging from the voice and physical

features of the assailant. Apparently he was not a total stranger to her as she even knew his name. Medical evidence confirmed that the injuries on the complainant's face were consistent with having been punched repeatedly.

[5] Section 173(b) of the Code provides that if the accused pleads guilty to the charge he may be convicted thereon and the court shall pass sentence according to law. The phrase "sentence according to law" has been judicially considered in *PP v. Jafa bin Daud* [1981] 1 LNS 28 where Mohamed Azmi J said:

> A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles.

[6] Section 294 of the Code provides the exception to s. 173(b) in that it allows the court to bind over the accused for good behaviour instead of sentencing him at once to any punishment. The provision reads as follows:

> When any person has been convicted of any offence before any Court if it appears that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender is released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

[7] Prior to being amended by Act A1274 which came into force on 6 October 2006 s. 294 of the Code only applied to adult offenders and where the offence is punishable with imprisonment. With the amendment the distinctions have been done away with. The amendment was probably to avoid the difficulty faced by the court in applying this provision where the offence carries an alternative sentence of fine as illustrated by the cases of *PP v. Idris* [1955] 1 LNS 93; *PP v. Yeong Yin Choy* [1976] 1 LNS 119; *PP v. Lim Hong Chin* [1994] 1 CLJ 79. The provision is now applicable to any person convicted of any offence before any court. The respondent was convicted before the coming into force of the amendment but in my view it has no bearing on this appeal.

[8] Although the order is discretionary regard must be had to the following factors: A

1) character, antecedents, age, health or mental condition of the offender; or

2) the trivial nature of the offence; or B

3) any extenuating circumstances of the case under which the offence was committed.

[9] It must be emphasised that an order under s. 294 of the Code is not a sentence. It is only an order to behave and the offender is not punished for the crime that he has committed. The court must not resort to this provision where the facts and circumstances do not justify such order. Where the law provides for a punishment the offender must be punished in accordance with that law. It is trite to say that the discretion under s. 294 of the Code must be exercised judiciously and not arbitrarily or at a whim or fancy. The learned authors of *Sohoni's Code of Criminal Procedure* 19th edn in commenting on s. 360 of the Indian Criminal Procedure Code which is similar though not identical with s. 294 of the Code have this to say at p. 3893: C D E

> The exercise of discretion given to Magistrates under this section needs a considerable sense of responsibility, and the Magistrates should not allow themselves to be misled into the use of this section by misplaced leniency and sympathy. F

[10] The learned authors went on to provide some useful guidance on how to apply this provision, as follows:

> Generally this provision of law is applied to crimes committed out of mere thoughtlessness, inadvertence or ignorance, sudden temptation or uncontrolled impulse, or under the influence of others, or by those who have been led astray for the first time by the force of circumstances; it can also be usefully applied to cases where persons on account of family discord, destitution, loss of near relations or other causes of like nature, attempt to put an end to their own lives. But where the act constituting the offence is an act of daring of reprehensible nature involving previous well-planned preparation and deliberate effort, it would amount to misplaced sympathy and unjust leniency; more so when the accused is otherwise mature enough to appreciate his action and its consequences. G H I

[11] Each individual case must of course be considered on its merits and must be examined with a view to ascertaining whether having regard to any of the matters in s. 294 of the Code binding over is in all the circumstances of the case expedient: see *PP v. Chew Jim* [1950] 1 LNS 48.

[12] The reference to character in s. 294 of the Code must mean the good character of the offender, including his clean record prior to his conviction. It is not without significance that the shoulder note to that section speaks of "First offenders". In the present case the respondent is not a first offender. He has a record of previous conviction for a similar offence for which he was sentenced to six months imprisonment and two strokes of the rotan. Obviously he has not learnt his lesson. This factor is therefore not on his side. But the learned magistrate decided not to send him to prison as according to her sending him to another term of imprisonment would harden him into repeating the same offence. With due respect to the learned magistrate this is a distortion of judicial reasoning. Where a person has a record of previous conviction and he repeats the same offence he is not entitled to leniency unless there are compelling reasons to do so. It is not in the public interest to be lenient with repeat offenders.

[13] As for the respondent's age, he was 34 years old at the time of the offence and 36 years old at the time of his conviction. Therefore he was neither too young nor too old to qualify for an order under s. 294 of the Code. As for his health and mental condition there was nothing before the court to warrant the exercise of the discretion in his favour. He did not say anything about his health or mental condition, nor did he produce any medical report to show that he was suffering from any health or mental problem. In my view if the offender wishes to rely on this factor he must produce a medical report or establish by some other means that his health or mental condition is such that it is not expedient to sentence him to any punishment.

[14] There were also no extenuating circumstances under which the offence was committed. The offence is punishable with imprisonment for a term which may extend to ten years with the option of fine or whipping or with any two such punishments. It is not a trivial offence by any account. The offence is prevalent and the court must take judicial notice of that fact. The complainant's evidence as alluded to earlier shows that violence

was used and the respondent had also threatened to kill her if she resisted. He even had the audacity to tell her that he only wanted her, as if she was his personal property.

[15] Clearly the offence was not committed in a moment of weakness and on the spur of the moment. It was a deliberate and calculated act on the part of the respondent. There can be no doubt that his intention was to rape the complainant. He might have succeeded if the complainant had not put up a fight. The photos of the scene of crime shows that the drain into which the complainant was pushed is quite deep and has concrete walls on both sides. The complainant could have been seriously injured if she had knocked herself against the wall after being pushed by the respondent. There was complete disregard for her safety.

[16] It is clear to me that none of the prerequisites for the exercise of discretion under s. 294 of the Code is present in this case. What the respondent said in his plea in mitigation is totally irrelevant for this purpose. He was merely pleading hardship from the consequences of his own act.

[17] The courts as guardians of public interest must deal properly with evildoers. Otherwise the public will be led into thinking that the courts are placing the interest of criminals above the interest of the public. In appropriate cases it is not wrong for the court to temper justice with mercy but it must not be at the expense of the public. The order of binding over in this case is wholly inappropriate and not fitting to the circumstances of the crime. The respondent's act calls for a deterrent punishment. It is for this reason that I set aside the order and substituted it with a sentence of four years imprisonment and three strokes of the rotan.